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No. 84-2018

In the Supreme Court of the United States

OCTOBER TERM, 1985

DIALAMERICA MARKETING, INC., PETITIONER

v.

WILLIAM E. BROCK, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether individuals who worked at home to locate telephone numbers for a telephone marketing firm were "employees" of the firm within the meaning of Section 3(e)(1) of the Fair Labor Standards Act, 29 U.S.C. 203(e)(1).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 757 F.2d 1376. The opinion of the district court (Pet. App. 27a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1985, and a petition for rehearing was denied on April 9, 1985 (Pet. App. 40a). The petition for a writ of certiorari was filed on June 27, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The issue in this case is whether petitioner's "home researchers" were employees within the meaning of Section 3(e)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(e)(1).

1. Petitioner, DialAmerica Marketing, Inc. (DialAmerica), is a telephone marketing firm that conducts operations in 20 states and maintains its principal place of business in Teaneck, New Jersey (Pet. App. 3a). A major portion of petitioner's business involves selling magazine renewal subscriptions to subscribers designated by magazine publishing companies (Pet. App. 3a, 28a; see Pet. 4). Petitioner prepares a card indicating the subscriber's name and address, locates the subscriber's telephone number and inserts it on the card, and forwards the card to one of its branch sales offices (Pet. App. 3a; see Pet. 4).

From 1976 to June 1982, petitioner relied on both in-house employees and homeworkers, known as "home researchers," to locate subscribers' telephone numbers (Pet. App. 3a).[1] Petitioner paid its in-house employees a minimum hourly wage, but paid the home researchers a piece rate unilaterally determined by petitioner. In 1976, petitioner set the rate at five cents per telephone number found. Petitioner increased the rate to seven cents, and then to ten cents, before it discontinued the home research program in 1982 (*id.* at 5a-6a, 30a). On some projects, petitioner set a higher piece rate to compensate the home researchers for the estimated lower percentage of correct numbers they were likely to find (*ibid.*).

Petitioner never rejected any applicant for home-research work, although it did subsequently discharge some home researchers for substandard work (Pet. App. 4a). Applicants received instructions for completing the magazine

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[1]Beginning in June 1979, petitioner also relied on a computer program for telephone-number research (Pet. App. 4a). After June 1979, about 50% of the telephone numbers sought by petitioner were located through the computer program (*ibid.*). Another 20% of the numbers were located by in-house employees through the use of telephone books and directory-assistance operators (*id.* at 4a, 29a). Home researchers located approximately 5% of the numbers sought (*ibid.*).

expire cards, and signed "Independent Contractor's Agreements" (*ibid.*). Petitioner initially gave each home researcher a box of 500 cards to complete and return to petitioner's Teaneck office within one week (*ibid.*). Thereafter, each researcher was free to choose the number of cards for completion in any given week, subject to a 500-card minimum and occasional limited availability of cards (*id.* at 5a).

Petitioner required the home researchers to write the telephone numbers in black ink or by porous tip pen, to place their initials and the letter "H" on each completed card, and to segregate duplicate cards (Pet. App. 5a). Petitioner instructed the researchers not to look for the telephone numbers of schools, libraries, government installations or hospitals (*ibid.*). It also instructed the researchers to set up an appointment to return each batch of cards at petitioner's Teaneck office one week after receipt and to wear appropriate attire when they came to the office to pick up or deliver cards (*id.* at 5a, 30a).

Petitioner did not designate the days, hours, or weeks that the home researchers worked (Pet. App. 5a, 29a-30a). Nor did it require the home researchers to keep records of the hours that they worked (*id.* at 5a). Rather, petitioner left the home researchers free to choose their own work schedules, subject only to the general requirement that cards be returned within one week of receipt (*id.* at 4a-5a, 29a-30a). The great majority of the home researchers worked continuously and exclusively for petitioner, and many did so for several years (*id.* at 15a, 33a).

2. The Secretary of Labor commenced this action in the United States District Court for the District of New Jersey to enjoin petitioner from violating the minimum wage and record-keeping provisions of the FLSA, and to compel petitioner to pay past wages owed under the FLSA. On

January 26, 1984, the district court entered summary judgment for petitioner (Pet. App. 27a, 38a). The court relied on petitioner's lack of supervision over either the hours of the home researchers or their work at home to conclude that petitioner did not exercise "the degree of control which we feel must be reached before such a situation may be classified as one between an 'employer' and an 'employee' " (*id.* at 35a).

The district court did find that the investment of the home researchers "was not great, the opportunity for profit or loss was small, and the skills required were few" (Pet. App. 36a), all factors supporting treatment of the home researchers as employees. But it noted that the researchers' earnings were typically secondary sources of family income and concluded that the researchers were not dependent on petitioner as a matter of economic reality (*ibid.*). Consequently, the district court concluded that the home researchers were not "employees" under the FLSA (*ibid.*). It also concluded that home researchers who also acted as "distributors," distributing work to other home researchers, were not "employees" for purposes of the FLSA (*id.* at 37a).

The court of appeals affirmed in part and reversed in part, concluding that home researchers other than distributors were employees for purposes of the FLSA, but distributors were not (Pet. App. 1a, 25a-26a). The court held that the totality of the circumstances must be considered in determining whether a worker is an employee (*id.* at 9a). It adopted the six-factor test announced in *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1370 (9th Cir. 1981), as an appropriate legal standard for determining whether home researchers were employees.[2]

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[2]*Sureway Cleaners* requires consideration of: "1) * * * the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss

The court of appeals expressly considered all six factors. It first noted that even the district court agreed that three factors—the home researchers' limited investment, skill, and opportunity for profit or loss—unequivocally supported a conclusion that the home researchers were employees (Pet. App. 11a-12a). The court of appeals acknowledged that petitioner did not exercise complete supervisory control over the home researchers, but remarked that this factor cannot be given controlling weight in the "homeworker" situation (*id.* at 12a-15a). The court of appeals observed that home researchers generally had a permanent relationship with petitioner and were an integral part of petitioner's business in the sense that they performed petitioner's primary type of work and did not perform that type of work for others (*id.* at 15a-16a). Thus, the court of appeals concluded that full consideration of the relevant factors supported a conclusion that the home researchers were "employees" for purposes of the FLSA (*id.* at 17a-18a). The court remanded the case for consideration of whether petitioner had satisfied the minimum wage and record-keeping requirements of the FLSA (*id.* at 26a).

ARGUMENT

The court of appeals applied well-settled legal principles to the particular facts of this case. Its interlocutory decision does not conflict with any decision of this Court or of another court of appeals. Accordingly, review by this Court is unwarranted.

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depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4) whether the service rendered requires a special skill; 5) the degree of permanence of the working relationship; 6) whether the service rendered is an integral part of the alleged employer's business." 656 F.2d at 1370. These factors are considered to determine "whether, as a matter of economic reality, the individuals 'are dependent upon the business to which they render service.' " *Ibid.*, quoting *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947).

1. Petitioner argues that the court of appeals "misconstrued the test established by this Court for determining the status of workers under the FLSA" and "imposed, in effect, a *per se* rule that homeworkers are always statutory 'employees' "(Pet. 11). These statements plainly mischaracterize the court of appeals' decision. The court, following the uniform practices of this Court and other courts of appeals, examined "the circumstances of the whole activity," *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 730 (1947), to determine the economic realities of the workers' labor. See *Tony & Susan Alamo Foundation* v. *Secretary of Labor,* No. 83-1935 (Apr. 23, 1985), slip op. 3, 10; *Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. 28, 33 (1961).[3] The court specifically eschewed per se rules and carefully considered all of the relevant factors through the six-part test specified in *Donovan* v. *Sureway Cleaners,* 656 F.2d 1368, 1370 (9th Cir. 1981). See Pet. App. 11a-17a.[4] Indeed, the court's conclusion that homeworker distributors were not employees obviously disproves petitioner's assertion that the court imposed a "*per se* rule that homeworkers are always statutory 'employees.' "

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[3]See also, *e.g., Donovan* v. *Brandel,* 736 F.2d 1114, 1116 (6th Cir. 1984); *Donovan* v. *Williams Oil Co.,* 717 F.2d 503, 505 (10th Cir. 1983); *Donovan* v. *New Floridian Hotel, Inc.,* 676 F.2d 468, 470 (11th Cir. 1982); *Donovan* v. *Sureway Cleaners,* 656 F.2d at 1370; *Usery* v. *Pilgrim Equipment Co.,* 527 F.2d 1308, 1311-1312 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

[4]The *Sureway Cleaners* factors, like the factors applied by other courts of appeals, are a summation of what this Court has deemed relevant in analyzing the economic realities of an employment relationship under the FLSA. 656 F.2d at 1370 & n.5. See *Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947); *Rutherford Food Corp.* v. *McComb, supra*; *United States* v. *Silk,* 331 U.S. 704, 716 (1947). *Bartels* and *Silk* involved the Social Security Act, rather than the FLSA, but are recognized as leading precedent on the FLSA "employment" relationship. See, *e.g., Goldberg* v. *Whitaker House Cooperative, Inc.,* 366 U.S. at 33.

Petitioner mistakenly contends that the court of appeals failed to give adequate consideration to the scope of petitioner's control over its home researchers, charging that the court's analysis "all but eliminates the control test as a factor in determining employee status" (Pet. 17). The court fully considered the control factor, noting that it "weighs in favor of the conclusion that the home researchers were not employees" (Pet. App. 17a). The court simply refused to give it "dispositive" weight (*id.* at 13a). That approach is plainly correct. See, *e.g., Bartels* v. *Birmingham,* 332 U.S. 126, 130 (1947) (employee status is "not to be determined solely by the idea of control").

The court of appeals correctly discerned the obvious similarities between this case and other cases recognizing homeworkers as "employees" for purposes of the FLSA (Pet. App. 13a-14a). Petitioner's home researchers were "not self-employed; nor [were] they independent, selling their products on the market for whatever price they [could] command." *Goldberg*, 366 U.S. at 32-33. They were "regimented under one organization," providing services that "the organization desire[d] and receiving the compensation the organization dictate[d]." *Id.* at 32 (footnote omitted). In these circumstances, the court of appeals correctly held that petitioner's diminished control and supervision over the home researchers could not conclusively determine their employment status. See, *e.g., McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F.2d 633, 637 (4th Cir.), cert. denied, 338 U.S. 900 (1949); *Walling* v. *American Needlecrafts, Inc.,* 139 F.2d 60, 62-63 (6th Cir. 1943).

Petitioner additionally objects to the court of appeals' determination that the home researchers' services were an integral part of its business (Pet. 20-26). The court rightly based that determination on the fact that home researchers performed a type of service that was central to petitioner's business operations. See *Sureway Cleaners,* 656 F.2d at

1372 (" 'Agents' do the same work as those individuals explicitly hired as employees * * *. Thus, the 'agents' are an essential part of [the] operation."); see also *Hodgson* v. *Ellis Transportation Co.*, 456 F.2d 937, 940 (9th Cir. 1972). The integral relationship factor looks to whether a service is so closely related to a firm's basic business that the worker who performs it cannot be an independent contractor. Petitioner is thus mistaken in asserting (Pet. 21-22) that the home researchers' services should be considered "non-integral" simply because their efforts contributed only a limited percentage to petitioner's total business volume.

Petitioner's objections to the court of appeals' assessment of the home researchers' "economic dependence" (Pet. 17-20) are likewise insubstantial. Contrary to petitioner's suggestion (*id.* at 17), "economic dependence" is not a specific factor that is weighed in determining employment; rather, it is an ultimate conclusion whether an employment relationship exists. The concept of "economic dependence" reflects a distinction between workers who function, in effect, as *independent* contractors and those who are, in economic reality, *dependent* employees. See, *e.g.*, *Bartels* v. *Birmingham*, 332 U.S. at 130-132; *Usery* v. *Pilgrim Equipment Co.*, 527 F.2d 1308, 1311 (5th Cir.), cert. denied, 429 U.S. 826 (1976).

Thus, the court of appeals properly noted that economic dependence turns upon whether the workers are "dependent on a particular business or organization for their continued employment" and not whether the workers "depend on the money they earn for obtaining the necessities of life, as the district court suggest[ed]" (Pet. App. 16a). Contrary to petitioner's assertions (Pet. 18-19), the Sixth Circuit's decision in *Donovan* v. *Brandel*, 736 F.2d 1114 (1984), is consistent with that approach. *Brandel* found that migrant farmer workers, who "could perform similar work at other farms" were not "economically dependent upon Brandel's

business." *Id.* at 1120. The migrant farm workers therefore functioned, in effect, as independent contractors.

2. Accordingly, the court of appeals' decision is consistent with the decisions of other courts that have cited similar factors in finding that homeworkers are "employees" under the FLSA. *Goldberg* v. *Whitaker House Cooperative, Inc.*, 366 U.S. at 32-33; *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F.2d at 636-637; *Walling* v. *Twyeffort, Inc.*, 158 F.2d 944, 947 (2d Cir.), cert. denied, 331 U.S. 851 (1947); *Walling* v. *American Needlecrafts, Inc.*, 139 F.2d at 62-63.[5] The decision turns on the particular, case-specific relationship between petitioner and the home researchers;

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[5]Petitioner's arguments to the contrary (Pet. 16-17, 24) lack merit. For example, the district court decisions that petitioner cites found homeworkers to be employees under the totality of the circumstances notwithstanding the supplemental nature of their earnings, *Silent Woman, Ltd.* v. *Donovan*, 585 F. Supp. 447, 451-452 (E.D. Wis. 1984); *Wirtz* v. *Wrightenberry*, 218 F. Supp. 404, 406-407 (M.D.N.C. 1963), or the absence of direct control over hours and work performance, *Hodgson* v. *Rancourt*, 336 F. Supp. 1119, 1121-1122 (D. R.I. 1972); *Mitchell* v. *Nutter*, 161 F. Supp. 799, 801 (D. Me. 1958); *Walling* v. *Freidlin*, 66 F. Supp. 710, 711-712 (M.D. Pa. 1946). They did so because other relevant aspects of the work relationship indicated employment status as a matter of economic reality. None of the other cases petitioner cites (Pet. 15, 23) casts doubt upon the court of appeals' decision. Two of those cases, *Brennan* v. *Sand Products, Inc.*, 371 F. Supp. 236 (W.D. Okla. 1973), and *Wirtz* v. *Manchester Sand, Gravel & Cement Co.*, 236 F. Supp. 885 (D.N.H. 1964), involved truck drivers who, unlike the homeworkers, had made capital investments and had opportunities for profit or loss that depended on skill, judgment and initiative, rather than mere efficiency. Another case, *Wirtz* v. *San Francisco & Oakland Helicopter Airlines, Inc.*, 244 F. Supp. 680 (N.D. Cal. 1965), aff'd, 370 F.2d 328 (9th Cir. 1966), involved individuals who worked on an airlines' premises with no expectation of compensation from the airlines. The remaining cases, *Atkins* v. *General Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983), and *Donovan* v. *American Airlines, Inc.*, 514 F. Supp. 526 (N.D. Tex. 1981), aff'd, 686 F.2d 267 (5th Cir. 1982), involved trainees, not homeworkers, and clearly are inapposite.

thus, it does not present questions of general importance warranting this Court's review. Indeed, petitioner has discontinued its home researcher program (Pet. 11) and only questions of past liability remain.

Even if petitioner raised a question of sufficient importance to warrant this Court's attention, review would be inappropriate at this time. The court of appeals' decision, remanding the case to the district court for determination of petitioner's compliance with the minimum wage and record-keeping requirements of the FLSA, is interlocutory. "[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen* v. *Bangor & A. R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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